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SUPREME COURT, U.S.

No. 06-955

In The Supreme Court of the United States

RONALD A. BUTLER,

Petitioner,

v.

ROBERT FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court has twice "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violation of their due process right to medical care while in custody," *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989), and the circuits are now divided five to five on the directly related question:

> Whether deliberate indifference is the degree of culpability that must be shown to establish that pretrial detention conditions amount to punishment in violation of the Due Process Clause of the Fourteenth Amendment.

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STATEMENT OF THE CASE

Ronald Butler was a pretrial detainee confined in the Ramsey County Adult Detention Center (ADC) at various times between July 7, 2001, and October 31, 2001, when he was transferred to the custody of the Minnesota Commissioner of Corrections and transferred to the Minnesota Correctional Facility (MCF) in St. Cloud, Minnesota. While he was continuously in custody between July 7 and October 31, due to occasional overcrowding at the ADC during this period, he was from time to time transferred to other detention facilities. These included the Ramsey County workhouse, another Ramsey County detention facility but one not under control of Sheriff Fletcher, and a detention facility (jail) in an adjacent Minnesota county (Washington County). As a result of such transfers, Butler was actually physically present at the ADC only between August 16 and September 6, and between October 18, 2001, and October 31, 2001 (App. 5a). While at the ADC, Butler was confined to a two-person cell. While at the Washington County facility he was placed in a one-person cell.

In accordance with Minnesota Statutes Sec. 144.445, subd. 1, Butler was administered a Mantoux test for determination as to whether he had tuberculosis symptoms within fourteen days of his confinement. This test was administered while he was confined in the Ramsey County workhouse during one of his transfers, and the results were negative. Because of the negative results, he was not further tested during his stay at the ADC or the Washington County facility.

Upon his transfer to the MCF in St. Cloud, Butler was given another Mantoux test on or about November 1, 2001. This test was positive.

Robert Fletcher is the elected Ramsey County Sheriff and was so before, during, and after Butler's confinement. First elected Sheriff in November 1994, Sheriff Fletcher is charged with and responsible for administration of the ADC and promulgating all policies and procedures governing operation of the ADC and supervision and control of detainees and his staff of deputies and unsworn personnel.

In execution of his administrative responsibilities, Sheriff Fletcher promulgated a detailed Policy and Procedures Manual which governs the custody and treatment of persons detained at the ADC (App. 18a). This manual, and a tuberculosis treatment protocol promulgated by the ADC medical director, Dr. Neal Holtan, prescribe the following TB diagnosis and treatment procedures for detainees in the ADC (App. 18a and 19a):

1. Within twenty-four hours of incarceration, the detainee receives an initial screening, usually done by booking deputies, during which the detainee is asked if he or she has any infectious diseases (such as tuberculosis), or symptoms suggestive of tuberculosis, such as night sweats, cough, fever, weight loss, or loss of appetite, or any other infectious disease or health problems.

2. Within fourteen days of admission to the ADC, the detainee is administered a Mantoux test.

3. If the Mantoux test is positive, a chest x-ray is administered to the detainee as a further diagnostic tool.

4. If the chest x-ray suggests **active** tuberculosis, the detainee is transferred to a hospital for further testing, such as a sputum test, and treatment if an active case is diagnosed. A detainee with active TB is **not** returned to the general population of the ADC until no longer contagious.

A measure of the effectiveness of this protocol and policy is the fact that during Sheriff Fletcher's tenure there has been only **one** identified case of active TB and that was in 1999.

In his complaint, Butler claimed that he did not receive the initial screening but admits that he was administered the Mantoux test within fourteen days of his incarceration, with negative results. Butler did not claim in his complaint that he exhibited any symptoms of active TB, nor did he allege in his complaint that any of his cellmates exhibited any such symptoms, and did not allege that he was denied or otherwise received inadequate medical treatment while at the ADC.

In his *pro se* complaint, Butler attributes his contracting of TB, which resulted in the positive Mantoux test he received at the MCF St. Cloud, solely to the facts that he was incarcerated in two-person cells while at the ADC, and did not receive an initial screening for tuberculosis prior to the Mantoux test he did receive.

The lone causal connection between Sheriff Fletcher's actions and Butler's positive Mantoux test made by Butler in his complaint rests on an "inferences" he draws that because he did not receive an initial screening, the inmates who shared his cell must not have received a screening, and one (or more) of them must have had an

active TB case which infected him, which would not have occurred but for the double celling.

In late November 2004, Sheriff Fletcher moved the trial court for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

In his December 29, 2004, response to Sheriff Fletcher's motion, Butler **for the first and only time** made factual allegations and complained that sanitary conditions at the ADC were unsatisfactory to him; that as many as 26 detainees were placed in holding cells five or six feet wide and ten or twelve feet in length for up to eight or more hours at a time; that heating and air conditioning were cut off from time to time; that "correction officers" took delight in closing the food tray slot, thus cutting off ventilation; that only a single toilet in the holding cell was available; and, because of those conditions, it is little wonder that he contracted tuberculosis.

In support of these allegations in his response, Butler submitted an affidavit from another inmate at the MCF, Charles Burns, who had been a pretrial detainee at the ADC between October 26, 2001, and February 13, 2002. Mr. Burns' affidavit claimed that during his confinement at the ADC, his cellmate, Kor Vang, told him that he (Vang) had had a positive Mantoux test, a chest x-ray, and was required to take antibiotics thereafter. Burns' affidavit did not contain any averments that Kor Vang exhibited any of the symptoms of an active, contagious TB infection which would have required Vang's segregation from the ADC's general population. This affidavit of Burns, despite its questionable admissibility regarding Kor Vang's statements, shows that Sheriff Fletcher's TB protocol was, in fact, being followed. Pursuant to the protocol, Vang had

received a Mantoux test; when that test was positive he received a chest x-ray, and was required to take antibiotics thereafter. Far from providing evidence that Fletcher had violated Butler's rights and exposed him to TB, this affidavit shows that Sheriff Fletcher was sensitive to the medical risk of TB infection and implemented an appropriate diagnosis and treatment program which not only treated the person with TB, but also ensured that other detainees would not be exposed to an active, contagious case of the disease.

In his summary judgment motion, Fletcher sought judgment and dismissal of Butler's complaint on two grounds; first, that Butler's **factual** allegations, even if accepted as true, were insufficient for a jury to conclude that he had contracted TB while at the ADC and second, that even if he **had** contracted TB, his Eighth and Fourteenth Amendment rights were not violated by Sheriff Fletcher's policies or actions. Both Sheriff Fletcher and the District Court recognized that because Butler was a pretrial detainee, the standards enunciated by this court in *Bell v. Wolfish*, 441 U.S. 520 (1979), that the constitutionality of the treatment of a pretrial detainee was to be measured by Fourteenth Amendment due process, rather than the Eighth Amendment cruel and unusual punishment, standards (App. 6a, 7a). Under relevant Eighth Circuit precedents (see, *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005); *Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (per curiam); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994) the district court held that the "deliberate indifference" analysis which had been applied to Eighth Amendment claims was also an appropriate analysis for Butler's Fourteenth Amendment claim. (App. 8a).

While acknowledging that Butler's factual allegations were "tenuous and speculative, and [Butler] most likely has not met his burden to set forth specific facts showing there is a genuine issue for trial" with respect to whether or not his TB was in fact contracted while at the ADC, (App. 9a), the District Court did not rule on this ground for Sheriff Fletcher's motion but granted Sheriff Fletcher's motion on the ground that there were no facts from which a jury could conclude that Sheriff Fletcher's policies caused a violation of either Butler's Eighth or Fourteenth Amendment rights, employing the "deliberate indifference" standard to analyze Sheriff Fletcher's conduct.

The Eighth Circuit, in its opinion, agreed and held that deliberate indifference was the appropriate standard of culpability for pretrial detainees (App. 22a). The Eighth Circuit did, however, expand the application of the "deliberate indifference" standard to evaluation of claims concerning not only the adequacy of medical care provided pretrial detainees, but also the food, clothing, and reasonable safety afforded pretrial detainees (App. 22a).

REASONS FOR DENYING THE WRIT

As a preliminary matter it is essential to recognize the narrow scope of Sheriff Fletcher's policies and conduct which underlie and form the basis of Butler's claims. While the Eighth Circuit applied its holding to a variety of conditions of confinement issues, such as whether the public officials have provided adequate food, clothing, shelter, medical care, and reasonable safety (App. 22a), Butler's real issue, as articulated in his complaint, is

solely grounded in Sheriff Fletcher's double-celling policy, and the alleged failure to screen detainees of the ADC for TB. He did not raise other issues in his complaint. It was not until his response to Sheriff Fletcher's summary judgment motion that Butler made any allegations of overcrowding and unsanitary conditions.

To the extent Butler bases his request for review by this Court on matters not raised in his complaint, this Court should deny his petition.

Butler asserts essentially two grounds for his petition in this matter. First, that there is a division among the Circuits whether the constitutionality of pretrial detention conditions should be addressed under the Fourteenth Amendment, due process standards articulated by the Court in *Bell v. Wolfish*, 441 U.S. 520 (1979) (Petition, p. 8), or Eighth Amendment deliberate indifference standards; and second, that the division presents an important issue as to whether the Eighth Amendment standard applicable to convicted prisoners should be applied to prevent "punishment" of pretrial detainees (Petition, p. 19).

Sheriff Fletcher requests that the Petition be denied on the following grounds: first, even assuming the split in the Circuits in connection with the Eighth Amendment versus Fourteenth Amendment analysis, as applied **in this case** to the narrow issue of the constitutionality of Sheriff Fletcher's actions with respect to medical care and double celling pretrial detainees, it cannot be held, in essence, that pretrial detainees are entitled to better medical care or more spacious cells than convicted prisoners; and second, there can be no doubt that the undisputed facts in this case show that Sheriff Fletcher's policies with

respect to medical care, and double celling did not violate either Butler's Eighth Amendment right to be free of cruel and unusual punishment **or** his Fourteenth Amendment due process rights.

A. EVEN ASSUMING A DIVISION OF OPINION AMONG THE CIRCUIT COURTS ON THE QUESTION WHETHER THE CONSTITUTIONALITY OF PRETRIAL DETENTION CONDITIONS SHOULD BE ADDRESSED UNDER A FOURTEENTH AMENDMENT DUE PROCESS STANDARD OF *BELL* OR THE EIGHTH AMENDMENT DELIBERATE INDIFFERENCE STANDARD IN THE CONTEXT OF THE PROVISION OF MEDICAL CARE AND TREATMENT, THE EIGHTH AMENDMENT STANDARD IS APPROPRIATE.

The plaintiffs in *Bell*, *supra*, consisted of both pretrial detainees and convicted prisoners who were confined at the Metropolitan Correctional Center (MCC), a federal correctional facility in New York City. *Wolfish v. Levi*, 439 F.Supp. 114, 119 (SDNY 1997). At the trial court, the plaintiffs, which included both pretrial detainees and convicted inmates, presented an impressively long list of complaints about their conditions of confinement, ranging from failure to classify inmates, which resulted in total confinement of detainees who were not dangerous, *id.* at 125, 126, overcrowding leading to double celling, *id.* at 134, to lack of conjugal visits. *Id.* at 142, 143. While the list of the plaintiff's grievances included a claim of inadequate medical care, the trial court concluded that the record with respect to this claim was incomplete, and declined to rule on this medical care claim. *Id.* at 165.

Both the trial court, *id.* at p. 124, and the Second Circuit Court of Appeals on review, *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978) recognized that pretrial detainees had constitutional rights different from convicted prisoners and evaluated the various conditions of confinement claims for pretrial detainees in light of the standard that pretrial detainees could only be subjected to those privations which inhere in their confinement or **which are justified by compelling necessities of jail administration** (Emphasis added).

This court, in *Bell* at 532, rejected the Second Circuit's compelling necessity test, and held that under the Due Process clause the appropriate inquiry into the constitutionality of the conditions of confinement of pretrial detainees was whether such conditions amounted to punishment, *id.* at 535, because the Due Process clause prohibits **punishment** prior to adjudication of guilt.

In *Bell*, this Court held that the essential question was whether the disability imposed upon pretrial detainees constituted punishment at all. The Court noted that there is a distinction to be drawn between *punitive* measures, which may not be constitutionally imposed prior to a determination of guilt, and mere regulatory restraints which may legitimately be imposed by detention center officials. Citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court outlined a number of tests to employ when determining whether a particular restriction is punitive:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of **scienter**, whether its operation will promote the traditional aim of

> punishment, retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. . . .

Id. at 168-169.

This Court, in *Bell* at 538-539, distilled the above holding into a formulation that courts must decide whether a disability is imposed for the purpose on punishment, or whether there was some other legitimate governmental purpose for the disability and that absent an express intent to punish on the part of detention facility officials, the determination would depend on whether an alternative purpose for the disability existed, and whether it appeared the disability was excessive in relation to the stated alternative purpose. The Court also noted that courts were to be mindful that this inquiry springs from constitutional requirements and judicial answers to the questions must reflect that fact rather than the court's idea of how best to operate a detention facility. *Id.* at 539.

This analysis works well when applied to many of the conditions of confinement of pretrial detainees. It is effective to determine actions and claims that officials have used excessive force in dealing with a pretrial detainee, whether the imposition of fees for services provided detainees is impermissible, *Slade v. Hampton Regional Jail*, 407 F.3d 243 (4th Cir. 2005), whether overcrowding is permissible, *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981), whether transfers within a prison population is permissible, *Covino v. Vermont Department of Corrections*, 933 F.2d

128 (2d Cir. 1991) and other conditions which, as the court noted in *Slade, supra* at 251, can be characterized as a "disability". If a particular condition of confinement can be characterized as a disability, it takes no great leap of logic to at least begin the analysis of whether the disability can be found to be punishment, and thus, absent a reasonable relationship to a non-punitive governmental objective, precluded by the Fourteenth Amendment.

This analysis, however, breaks down when applied to medical care provided detainees.[1]

The difficulty is that providing a **benefit** to detainees, particularly medical care (which is in many cases better care than they receive when they are not detained in a correctional facility) simply does not constitute the traditional notion of a disability or punishment.

This court, post *Bell*, has twice implicitly acknowledged that medical care may not lend itself to a *Bell* Due Process analysis to the exclusion of the Eighth Amendment deliberate indifference standard. These cases, *City of Canton v. Harris*, 489 U.S. 378, 388, n.8 (1989), and *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983) reserved ruling on whether application of the deliberate indifference analysis to claims of inadequate medical care was appropriate in Fourteenth Amendment due process

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[1] While complete failure to provide medical care to pretrial detainees arguably could be found a disability, *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981), the facts in this case are that Sheriff Fletcher had in place a very elaborate protocol and program to address the medical needs of detainees at the ADC, and hence cannot be found to have completely failed to provide medical care.

challenges to alleged inadequacies in the level of medical care by pretrial detainees.

The difficulty applying any standard other than deliberate indifference is clear and illustrated in this case by Butler's claim; any analysis of whether the medical care provided a pretrial detainee is "reasonably" related to a non-punitive governmental objective quickly turns into an analysis of the reasonableness of the medical care provided; and whether the existence of different opinions as to the adequacy of the care can be used to show that the governmental officials' actions were **not** reasonable.

This is precisely one of Butler's arguments before the Eighth Circuit. In his appeal, Butler cites standards for prevention of tuberculosis promulgated by the Center for Disease Control, *Prevention and Control of Tuberculosis in Correctional Facilities: Recommendations from CDC*, 45 Morbidity and Mortality Wkly. Rep. (June 7, 1996), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr4508.pdf and the Federal Bureau of Prisons ("BOP") in Federal Bureau of Prisons, *Preventive Health Care* (October 2005), *available at* http://www.bop.gov/news/PDFs/phc.pdf, for the proposition that because these organizations provide different protocols for TB detection and treatment, a genuine issue for trial exists to determine whether Sheriff Fletcher's steps were reasonable and, hence, not punishment.

The difficulty with this, and any other, analysis which permits a complainant to argue that since there are other organizations or professionals who have different approaches to medical care, a triable fact issue as to the reasonableness of a public official's conduct is created. This, as the Eighth Circuit noted in its opinion is a **negligence** standard (App. 22a). It would, if adopted, convert

virtually every pretrial detainee's complaint of the medical care provided into, essentially, a medical malpractice action – a claim which this Court has emphatically stated is **not** a constitutional or other civil right subject to protection under 42 U.S.C. §1983. *Estelle v. Gumble*, 429 U.S. 97, 106 (1976); *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

Given that this Court has held that claims of mere medical malpractice do not support a claim under 42 U.S.C. §1983, it follows that for this Court to find that the deliberate indifference analysis applied by the Eighth Circuit is not appropriate and that an analysis which evaluates the *reasonableness* of a public official's medical care policy and procedure is necessary, courts will have to fashion an analytical tool which is in the twilight zone between deliberate indifference and mere medical malpractice. That zone is too small and too fraught with the danger that every pretrial detainee's claims of inadequate medical care will virtually always create a triable fact issue.

Butler's application should be denied because the Eighth Circuit's reliance on the deliberate indifference standard is entirely appropriate in cases involving medical treatment of pretrial detainees. Application of the deliberate indifference standard avoids the medical malpractice issue without undermining the Fourteenth Amendment due process rights of pretrial detainees.

In addition, as the Eighth Circuit noted, application of the Eighth Amendment deliberate indifference standard insures that convicted prisoners will receive the same kind of medical care and treatment as pretrial detainees. Any other standard risks creation of a two-tiered system in

which pretrial detainees receive better medical care than convicted inmates – hardly a standard which comports with the notion that all persons confined by government have the same rights to basic human needs.

B. SHERIFF FLETCHER'S CONDUCT DID NOT VIOLATE BUTLER'S FOURTEENTH AMENDMENT RIGHTS.

Even if this Court finds that there is a significant split among the Circuit Courts as to the application of the deliberate indifference standard of analysis to condition of confinement claims by pretrial detainees, the petition for certiorari in this case should be denied. Sheriff Fletcher is entitled to judgment in his favor even if Butler's claims are viewed under the Fourteenth Amendment substantive due process clause.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states that "[no] State [shall] deprive any person of life, liberty, or property without due process of law." "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The substantive due process clause protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

Substantive due process violation occurs only when the official's behavior is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Lewis, supra, at 847, n.8. Negligence is insufficient to support a claim under the substantive due process clause of the Fourteenth Amendment. *Id.* at 849. Conduct that will most likely shock the contemporary conscience is government official's deliberate conduct that cannot be justified by any legitimate governmental interest. *Id.* (quoting *Daniels v. Williams, supra.*)

When determining whether a plaintiff stated a substantive due process violation, this Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. at 125 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226 (1985)). This Court further explained that in determining whether a substantive due process violation occurred, it is important to focus on specific allegations put forth in complaint to see how plaintiff "describes the constitutional right at stake and what the [sheriff] allegedly did to deprive [him] . . . of that right." *Id.*

Examination of Petitioner's complaint shows that he does not allege that any of his cellmates exhibited any of the physical symptoms of active (contagious) tuberculosis, such as persistent cough, weight loss, night sweats, or chronic tiredness; he does not allege that he himself exhibited any of those symptoms or that he asked for and/or was denied medical care.

Further, Petitioner failed to point to any conduct on the part of Sheriff Fletcher that deprived Petitioner of his constitutional rights. He points to no written policy or custom of Sheriff Fletcher not to screen detainees for tuberculosis. In fact, Sheriff Fletcher implemented written

policy requiring screening detainees for this disease. The Adult Detention Center (ADC) had a comprehensive process for the diagnosis and treatment of TB which by its terms and as implemented insured that pretrial detainees were NOT subjected to contact with inmates who had active, contagious cases of TB. The first step required an "Intake Interview" during which inmates are interviewed to determine "whether they have any infectious diseases or symptoms suggestive of tuberculosis including cough, weight loss, fever, night sweats or loss of appetite." If an inmate does present with any symptoms suggestive of TB, a chest x-ray is taken within 72 hours. The second step provided that a Mantoux[2] test be administered within fourteen days of an inmate's detention at the ADC, as required by Minn. Stat. §144.445, subd. 1. If the Mantoux test is positive, a chest x-ray is taken. If the x-ray suggests active TB, the inmate is transferred to a hospital and treated.

As required by Sheriff Fletcher's written policy and Minn. Stat. §144.445, subd. 1, Butler was given a Mantoux test on July 21, fourteen days after his initial detention at the ADC. His test was negative. In addition, no person with active, contagious tuberculosis was detained at the ADC at the same time as Butler. In fact, the ADC had no active case of tuberculosis since 1999.

As explained above, Sheriff Fletcher has promulgated, in accordance with Minnesota law, a written policy

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[2] The Mantoux test is used to detect tuberculosis. A dose of tuberculin is injected into the skin on the forearm and the results are read 48 to 72 hours later. The person is considered to be positive for TB, if a palpable raised hardened area measuring 10mm develops at the injection site.

requiring screening and testing for tuberculosis. Petitioner's allegations failed under the Eighth Amendment standard adhered to by the Eighth Circuit Court of Appeals. Similarly, they fail under the Fourteenth Amendment substantive due process because Petitioner failed to show that any of Sheriff Fletcher's conduct was "so egregious [and] outrageous, that it may fairly be said to shock the contemporary conscience [of any court]." *Lewis, supra*, at 847, n.8.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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